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IN THE

Supreme Court of the United States

October Term, 1967

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CHENG KAI FU,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Jurisdiction

The judgment of the Court of Appeals was entered on November 16, 1967. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Is an alien entitled to a hearing when applying for relief under Section 243(h) of the Immigration and Nationality Act. 8 U. S. C. 1253(h)?

2. Is it incumbent upon the Attorney General of the United States to enunciate an appreciable standard in determinations involving Section 243(h), especially in view of the most recent amendment to that section?

Statutes Involved

Section 243(h) as originally worded provided:

> "(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any Country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

Section 243(h) as amended (Act of October 3, 1965) now provides:

> "(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

Statement

The facts are not in dispute:

The Petitioner is a native and citizen of China who entered the United States on or about October 15, 1964 as a crewman authorized to remain here during his vessel's stay in port not to exceed twenty-nine (29) days. The Petitioner overstayed this authorized period and was apprehended by officers of the Immigration and Naturalization Service in April, 1965. His deportation hearing was held on April 26, 1965 at the conclusion of which he was ordered deported to "The Republic of China on Formosa". The Republic of China refused to issue a travel document to that country (Petitioner has never resided

there), and the Government then moved to reopen the deportation proceeding so that Hong Kong could be designated as the place of destination. The Government's motion was granted and Hong Kong was so designated.

Apparently the Government then obtained a travel document from the British Visa Office in New York. It has been contended throughout this proceeding that the only document obtainable for a political fugitive such as this Petitioner is a document issued solely for deportation to Hong Kong; that the Petitioner is not a British subject and that his chances of ever escaping from Hong Kong to some other area of the world are minimal.

On October 18, 1967, pursuant to a notice from the Immigration Service the Petitioner surrendered himself to the Immigration Service for deportation to Hong Kong. At the same time he moved to reopen his case so that consideration might be made of his application for a stay of deportation as provided for by Section 243(h) of the Immigration and Nationality Act, 8 U. S. C. 1253(h) which section authorizes the Attorney General to stay deportation when in his opinion the alien "would be subject to persecution on account of race, religion or political opinion".

It was contended in his motion papers that two (2) factors had changed since the Petitioner's original deportation hearing:

(1) Section 243(h) has been amended by Congress (Act of October 3, 1965, 79 Stat. 918) so as to substantially broaden the possible application of the relief provided for by the Section; and

(2) From newspaper reports it appeared that the situation in Hong Kong itself had changed, most noticeably

from the riots which commenced in May, 1967 and from speculation that the British might completely withdraw from the Far East.

Accompanying the motion was the Petitioner's affidavit in which he set forth the circumstances of his escape from the mainland of China in 1957, the reasons for his anti-Communist attitude, and his fear that a return to Hong Kong would subject him to hardship and deprivation which would amount to persecution as that term now appears in the statute.

On October 26, 1967 the Board of Immigration Appeals denied the motion without a hearing. The Petitioner then brought a Petition of the Board's decision before the United States Court of Appeals for the Second Circuit. The Board's decision was affirmed by the Court of Appeals in a decision rendered November 16, 1967 with an opinion by Chief Judge Lumbard.

Reasons for Granting Writ

Although this Petitioner is a Chinese crewman, the purport of the decision below could have the effect of denying to numbers of other political exiles in this country the possibility of availing to themselves relief which Congress conceivably intended they should have. Under this decision relief may be denied without the hearing provided for by regulation. The decision below is contrary to a Ninth Circuit decision in that it permits the Attorney General to ignore an important statutory change by refusing to articulate and define a standard in keeping with that change.

POINT I

The right to a hearing.

The Attorney General's authority under Section 243(h) has been delegated to the Special Inquiry Officer who conducts the deportation hearing (See 8 C. F. R. 242.8). His determination is subject to appeal to the Board of Immigration Appeals (8 C. F. R. 242.17). Where, as in the instant case the alien has already received a deportation hearing in which the relief was not requested the acceptable procedure is to file a motion to reopen as provided for by 8 C. F. R. 242.22, setting forth those new facts which would justify a hearing on the matter. Since this Petitioner's original deportation hearing on April 26, 1965, two events have occurred which are of extreme importance: (1) the basic statute has been amended in such a manner, it is felt, so as to make him eligible for the requested relief, and (2) the riots in Hong Kong which commenced in May, 1967, have accentuated the fear of deportation to that colony. The decision below enunciates a principle which is contrary to a long line of cases which guarantees to a Section 243(h) applicant the right to have his application considered in accordance with the pertinent regulations. As indicated, the regulations now provide for a hearing.

The cases have been uniform in guaranteeing such persons a hearing. See *Sovich* v. *Esperdy,* 319 F. 2d 21 (2 Cir., 1963), and the cases cited therein. Even a second hearing has been ordered where there was an intervening change in the regulations. *Militin* v. *Bouchard,* 370 U. S. 292, 82 S. Ct. 156, 8 L. Ed. 2d 501 (1962).

There was only one Court of Appeals decision cited by Chief Judge Lumbard in his opinion: *Lena* v. *I. N. S.*, 379 F. 2d 536 (7 Cir., 1967). However, even the alien in the *Lena* case was given a full and extensive hearing on the matter.

POINT II

An appreciable standard in light of the amendment.

Section 243(h), 8 U. S. C. 1253(h) was amended by the Act of October 3, 1965, deleting the term "physical persecution" and substituting in lieu thereof "persecution on account of race, religion, or political opinion".

Shortly after the amendment the Government contended that Congress had not really intended a change in the construction and administration of the statute. This argument was rejected by the Court of Appeals for the Ninth Circuit in *Andrijic* v. *I. N. S.*, 352 F. 2d 512 (9 Cir., 1965), wherein it was stated in part:

> "Pointing out that section 243(h) relief is thus no longer expressly limited to cases where the applicant would be subject to 'physical' persecution, petitioner contends that the Service should be asked to reëxamine the application in the light of the statute as it now reads.
>
> We agree. The order of the special inquiry officer and of the Board, in keeping with the statute as it then read, discuss only the possibility of 'physical persecution.' It is true that, through developing decisional law the quoted term has been given a rather broad reading. However, there is nothing in the record to indicate how broadly the Service read

> that term in deciding this case, or whether its construction accords with the meaning which must now be given to the statutory term 'persecution.'" (At page 513 of the opinion.)

Two years after the Ninth Circuit's decision the Government insists on making the same argument. The Board of Immigration Appeals does cite one of its published decisions in support of its position, the *Matter of Kiu Man,* I. D. #1753. However, that decision is not in point because Kiu Man is a native of Hong Kong and presumably a British subject and not a political refugee as is the instant Petitioner. Although there is no published Board of Immigration Appeals decision squarely in point the Court of Appeals has now confirmed the Government's argument that there need be no adjustment in the application of the statute, in the following language:

> "In the absence of a sufficient showing of a likelihood of persecution, we do not need to consider the contention that the government has failed to articulate the standards applied in applications for relief under Section 243(h), or has failed to adjust these standards to any change in the statutory language." (From page 282 of the decision below.)

The cart is before the horse. It can only be through a hearing that a "sufficient showing of a likelihood of persecution" may be established.

The cases are also uniform as to the proposition that the question of Section 243(h) relief is vested solely within the discretion of the Attorney General of the United States and that the courts may only review as a question of law that standard as applied by the Attorney General, i.e., as

to whether the standard falls within the purview of the statute. *Sovich* v. *Esperdy*, 319 F. 2d 21 (2 Cir., 1963); *Dunat* v. *Hurney*, 297 F. 2d 744 (3 Cir., 1961).

In the instant matter there is no indication that the Attorney General has evolved any standard whatsoever. To the contrary, it is the Court of Appeals which has supplied a standard. Since this decision was rendered on November 16, 1967 the Board of Immigration Appeals now justifies its refusal to grant hearings by citing the decision rendered by the court below. As would be expected none of these decisions have been published by the Board.

POINT III

What might an appropriate standard be?

As previously indicated the statute has vested in the Attorney General the discretion as to whether or not relief should be granted under Section 243(h). The Attorney General has delegated this authority by regulation to the Special Inquiry Officers for determination pursuant to hearing. Their decisions may be appealed to the Board of Immigration Appeals. Because of the highly discretionary nature of the relief the courts may not compel the setting of a given standard. However, in the instant matter, no standard has been set. There has been absolutely no effort on the part of the Board of Immigration Appeals to define the term "persecution" as it now exists in the amended version of the statute and as it might apply to refugee escapees from the mainland of China who are scheduled for deportation to Hong Kong. In the absence of a standard it is suggested that Congress intended Section 243(h) relief be extended so as to cover political refugees such as those who escaped from the mainland of China.

The Act of October 3, 1965 added a new preference to the Immigration law, the "refugee" provision, *Section 203(a)(7) of the Immigration and Nationality Act. 8 U. S. C. 1153(a)(7).* The language of Section 203(a)(7) is almost identical to that of the amended version of Section 243(h).

Section 203(a)(7) provides in part:

> ". . . (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulation as he may prescribe . . . to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (a) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, . . ."

It would appear Congress intended that Section 243(h) and Section 203(a)(7) be interpreted in a like manner and applied in a supplementary fashion.

The amendment to Section 243(h) was introduced in the House of Representatives on August 25, 1965 by Congressman Poff from Virginia and passed on that date. At the time of the introduction and passage of the amendment Congressman Poff made an explanation as to the intent of the amendment. His complete statement appears in the Appendix. Concerning the amendment to Section 243(h) Congressman Poff stated:

> ". . . There can be no mistake about the meaning of that language. Indeed, as will be seen from page 26 of the bill, this same language is used in the defini-

> tion of 'refugee'. In other words, an alien who seeks to enter this country as a refugee must prove that he is a victim of persecution on account of one of three things, race, religion, or political opinion. My amendment simply requires that the alien who is about to be deported from this country must bear the same burden of proof if he is to be spared the penalty of deportation and retained in this country." . . . (89th Congress, Vol. III, Part 16, pp. 21803, 21804 bound volume; Daily Ed. August 25, 1965.)

The Government has often conceded that those persons such as this Respondent who escaped from Communist China are in fact political refugees. There have been a number of refugee programs initiated in Hong Kong, the last of which occurred in 1962, in which a large number of such persons were paroled into this country and subsequently adjusted to permanent residents. The Department of State recently announced that it will inaugurate a similar program next July.

The Respondent is a transient without a country. He is not a British subject. Before attempting to deport him to Hong Kong the Government shopped for a place to which he could be deported. Not even the "Republic of China on Formosa" would accept him. Deportation to Hong Kong would be tantamount to banishment, a return to a lifetime of abject poverty and hopelessness from which he can never hope to escape. It is unconscionable that the Attorney General will not give at least some serious consideration to his application for relief.

CONCLUSION

Wherefore, in consideration of the magnitude of the questions presented, and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
February 13, 1968.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

Before:

LUMBARD, *Chief Judge*,
MEDINA and HAYS, *Circuit Judges*.

LUMBARD, *Chief Judge*:

These cases, which have been consolidated for the purposes of this proceeding, all raise the same question: whether it was an abuse of discretion for the District Director in the case of Yui Ting Sang and Hui Mau Cheuk and the Board of Immigration Appeals in the case of Cheng Kai Fu to deny without a hearing the motions to stay deportations and re-open the proceedings based on the claim under Section 243(h) of the Act, 8 U. S. C. §1253(h),[1] that the aliens will be subjected to persecution if they are returned to Hong Kong. The issue presented is whether these aliens have made a sufficient showing to compel the government to afford them a hearing on their motion to re-open the proceedings in which they were afforded due process and which resulted in lawful orders of deportation entered under 8 U. S. C. §1252.

The essential facts with respect to each alien are not in dispute. Each is a native and citizen of the Republic of China, who was admitted to the United States as an alien seaman authorized to remain here during his vessel's stay

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[1] 8 U. S. C. §1253(h):

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

in port but not to exceed 29 days. Section 252(a) of the Act, 8 U. S. C. §1282(a). Each of them thereafter remained unlawfully in the United States until he was apprehended.

Proceedings for deportation were then properly instituted under the Act. Cheng Kai Fu, the petitioner in one case, was apprehended in April 1965, and on April 26 of that year he was given a hearing and ordered deported to Taiwan. The Republic of China refused to issue a travel document permitting his re-entry to that country, and subsequently the government moved to re-open the proceeding so that Hong Kong could be designated as the place of destination. On October 18, 1967 petitioner surrendered himself for deportation to Hong Kong. He then moved to re-open the proceedings and requested an opportunity to apply for a stay under Section 243(h) of the Act, 8 U. S. C. §1253(h).[2] In his motion the petitioner set out the circumstances of his escape from the mainland of China in 1957 and alleged that a return to Hong Kong at this time would subject him to hardship and deprivation which he claims amount to persecution as interpreted in Section 243(h). The Board of Immigration Appeals on October 26, without a hearing, denied his motion to re-open and the alien then brought this petition for review of that decision.

The appellants, Yui Ting Sang and Hui Mau Cheuk, appeal from an order of the Southern District Court denying their motion for a preliminary injunction staying the

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[2] The regulations provide in 8 C. F. R. §103.5:

> "The filing of a motion to reopen or a motion to reconsider or of a subsequent application after notice of denial shall not, unless the Service directs otherwise, serve to stay the execution of any decision made in the case or to extend a previously set departure date."

execution of orders of deportation pending determination of their action for a declaratory judgment in which they challenged the denial of a stay of deportation by the District Director. In their application to the District Director, the appellants also asked for relief under Section 243(h), claiming that they would be subjected to persecution in Hong Kong. Thus, although these cases arise from varying procedures, they present an identical issue.

Under Section 243(h) of the Act the Attorney General is given discretion to stay deportation in circumstances where the alien "would be subject to persecution on account of race, religion, or political opinion" in the country to which he is being deported. Only where there is a clear probability of persecution to the particular alien is this discretion to be favorably exercised. See, e.g., *Lena* v. *I. N. S.*, 379 F. 2d 536 (7 Cir. 1967).

We have examined the papers submitted by the three aliens and we are convinced that they have failed to sustain their burden of showing some likelihood that reopening the proceedings will result in a stay of deportation. We therefore find that there was no abuse of the discretion confided in the Board of Immigration Appeals and the District Director. Each of these aliens was afforded the full benefit of procedural due process in their deportation proceedings. They cannot require that these steps, including a written statement of charges, the opportunity to cross-examine and produce evidence, and a full hearing, be repeated merely because they have filed a petition to reopen. As Judge Mansfield said in *Lam Leung Kam* v. *Esperdy*, "If such were the law, all deportations could be permanently frustrated by the mere filing of successive petitions to reopen." *Lam Leung Kam* v. *Esperdy*, —— F. Supp. —— (S. D. N. Y. 1967).

In order to forestall deportation the aliens must show some evidence indicating that they would be subject to persecution in Hong Kong on account of race, religion, or political opinion. This they have failed to do. The statement that they are anti-Communists and that the situation in Hong Kong is steadily worsening is not sufficient. And the contention that Hong Kong will imminently fall from British hands to the Chinese Communists is too speculative to be the basis of deportation proceedings. We of course are not privy to any special or confidential information on the situation in Hong Kong, and we can hardly assume that a takeover is imminent simply because there has been rioting in recent months.

Regarding the situation in Hong Kong, the Immigration and Naturalization Service has at least as much information in this regard as does this court, and in view of the fact that Congress has given the District Director or the Board of Immigration Appeals broad discretion in this area, we should not disturb their exercise of discretion on as insignificant a showing as these aliens have made. Their status in Hong Kong as exiles from the mainland of China will not distinguish them from thousands of others, and the physical hardship or economic difficulties they claim they will face will be shared by many others. Those difficulties do not amount to the kind of particularized persecution that justifies a stay of deportation. Their status as refugees or political exiles is immaterial under Section 243(h) which looks to their likely condition in the place to which they are sent. Thus, whether they would be persecuted in mainland China is not relevant to the claim they make here. This is the conclusion that has been reached by the several district judges confronted with this problem. *Lam Leung Kam* v. *Esperdy*, 67 Civ. 2833

(S. D. N. Y. Aug. 7, 1967) (Mansfield, *J.*); *Chan Chung Yin* v. *Esperdy*, 67 Civ. 3193 (S. D. N. Y. Aug. 30, 1967) (Wyatt, *J.*); *Kwong Chau* v. *Esperdy*, 67 Civ. 3231 (S. D. N. Y. Sept. 5, 1967) (McLean, *J.*). In the absence of a sufficient showing of a likelihood of persecution, we do not need to consider the contention that the government has failed to articulate the standards applied in applications for relief under Section 243(h), or has failed to adjust these standards to any change in the statutory language.

Accordingly, the petition of Cheng Kai Fu is denied; and the decision of the district court denying the motions of Yui Ting Sang a/k/a Zai Ding Sung, and Hui Mau Cheuk for a preliminary injunction staying execution of their outstanding deportation orders in affirmed.

Legislative History Re: Section 243(h)—Excerpts From Congressional Record—August 25, 1965

AMENDMENT OFFERED BY MR. POFF

Mr. Poff. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

> Amendment offered by Mr. Poff: On page 40, strike out lines 3 and 4, and insert in lieu thereof the following:
>
> "(f) Section 243(h) is amended by striking out 'physical persecution' and inserting in lieu thereof 'persecution on account of race, religion, or political opinion.' "

Mr. Celler. Mr. Chairman, will the gentleman yield?

Mr. Poff. I will be happy to yield to the chairman of the committee.

Mr. Celler. Mr. Chairman, we have no objection on this side to that amendment.

Mr. Moore. Mr. Chairman, will the gentleman yield?

Mr. Poff. Mr. Chairman, I am happy to yield to the gentleman from West Virginia.

Mr. Moore. Again, Mr. Chairman, we have no objection to this amendment on this side. I believe the language that has been suggested is superior to that contained in the bill and will, as we look to the future, be more easily operable than the language therein contained at the present time.

Mr. Poff. Mr. Chairman, I ask unanimous consent to revise and extend my remarks at this point in the RECORD.

The Chairman. Is there objection to the request of the gentleman from Virginia?

There was no objection.

Mr. Poff. Mr. Chairman, section 243(h) of the present law authorizes the Attorney General to suspend deportation of any alien if the alien can establish to his satisfac-

tion that he would, if returned to a foreign country, be subject to physical persecution.

The language of the bill on page 40 deletes the word "physical." I can understand and appreciate the purpose of this change. The clause "physical persecution" is entirely too narrow. It is almost impossible for the alien under an order of deportation to assemble the quantum of evidence necessary to discharge his burden of proof.

On the other hand, I suggest that the word "persecution" standing alone may be too broad in concept and too flexible in definition. It seems to me that between these two extremes there should be some reasonable middle ground. My amendment seeks to approach that middle ground. First, it broadens it beyond the boundaries of physical persecution but it narrows the word "persecution" by limiting the scope of its interpretation to three specifics; namely, persecution on account of race, persecution on account of religion, or persecution on account of political opinion.

There can be no mistake about the meaning of that language. Indeed, as will be seen from page 26 of the bill, this same language is used in the definition of "refugee." In other words, an alien who seeks to enter this country as a refugee must prove that he is a victim of persecution on account of one of three things, race, religion, or political opinion. My amendment simply requires that the alien who is about to be deported from this country must bear the same burden of proof if he is to be spared the penalty of deportation and retained in this country.

In all truth, I believe that this result is what the draftsmen of this subsection intended to achieve when they proposed the deletion of the word "physical."

The Chairman. The question is on the amendment offered by the gentleman from Virginia [Mr. Poff].

The amendment was agreed to.